Fuller J.
Jan. 14th.
1873

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~547~~. 419 100

CHARLES MORGAN, PLAINTIFF IN ERROR,

vs.

JOHN PARHAM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED JUNE 14, 1871.

Dec. 2, 1872

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INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	3	1
Agreement	6	2
Power of attorney	7	2
Bond	9	3
Summons	11	4
Declaration	12	4
Defendant's plea	14	5
Agreed facts	16	6
Jury waived	25	9
Judgment	26	9
Bill of exceptions	26	9
Clerk's certificate	27	8

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the fifth judicial circuit and southern dirtrict of Alabama, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Charles Morgan, plaintiff, and John Parham, defendant, a manifest error hath happened, to *to* the great damage of the said Charles Morgan, as by his complaint appears. We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things con-
2 cerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy.

Attest:

[SEAL.] NATHANIEL W. TRIMBLE,
Clerk United States Circuit Court,
Southern District Alabama.

Let the above writ issue.

W. B. WOODS,
Judge of the Circuit Court of the United States for 5th Circuit and Southern District of Alabama.

3 UNITED STATES OF AMERICA, *ss:*

TO JOHN PARHAM, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Alabama, wherein Charles Morgan is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 23rd day of March, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] W. B. WOODS,
Judge United States Circuit Court, 5th Circuit & Southern Dist. Alabama.

4 (Indorsed:) Received this 13th May A. D. 1871, and executed on the same day by serving copy of the within citation on the defendant in error, John Parham.

R. W. HEALY,
U. S. Marshal,
By W'M D. GAGER,
Deputy U. S. M.

5 Personally appeared before me, N. W. Trimble, clerk of the United States circuit court for the fifth judicial circuit and southern district of Alabama, and United States commissioner, William D. Gager, who, being duly sworn, says that, as deputy marshal of the United States for said southern district of Alabama, he did, on the 13th day of May, A. D. 1871, serve a true and correct copy of the citation attached hereto on John Parham, the defendant in error.

WM D. GAGER,
Deputy U. S. Marshal So. Dist. Ala.

Subscribed & sworn to before me this 13th May, A. D. 1871.

N. W. TRIMBLE,
Clerk & U. S. Commissioner.

6 Circuit court of the United States for the fifth judicial circuit and southern district of Alabama, December term, 1870.

WEDNESDAY MORNING, *January 11th*, 1871.

Court met pursuant to adjournment—present, Hon William B. Woods, judge presiding.

* * * * * *

CHARLES MORGAN
vs.
JOHN PARHAM.

The plaintiff, by his attorney, prays a writ of error to the Supreme Court of the United States, which prayer is granted by the court.

In this case it is agreed by and between the attorneys of the respective parties, that the necessary bond for costs in this case, in this court and in the Supreme Court of the United States, may be fixed in the amount thereof, taken, and approved by the clerk of this court in vacation, it being the object of this stipulation to waive the necessity
7 of taking bond before the judge in term time.

C. W. RAPIER, *for Def't.*
GRANDIN & TOULMIN,
For Plaintiff.

Filed January 11th, 1871.

N. W. TRIMBLE, *Clerk.*

Power of attorney.

Know all men by these presents that I, Charles Morgan, of the city of New York, in the county and State of New York, have made, constituted, and appointed, and by these presents, do make, constitute, and appoint Capt. Thomas Forbes, of the city of Mobile, in the State of Alabama, my true and lawful attorney, for me and in my name, place, and stead, to sign my name to an appeal bond in the case of Charles Morgan vs. John Parham, lately determined in the United States circuit court, fifth judicial circuit and southern district of Alabama, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with

full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereunto set my hand and seal the 3d day of February, in the year one thousand eight hundred and seventy-one.

(Signed) CHA'S MORGAN. [SEAL.]

Sealed and delivered in the presence of—
W'M V. ARCHER.
J. R. M'LOUD.

STATE OF NEW YORK,
City and County of New York, ss:

I, William V. Archer, a commissioner of the State of Alamama, in New York, duly authorized to take acknowledgment of deeds and other instruments to be used in said State of Alabama, do hereby certify that Charles Morgan, whose name is signed to the foregoing power of attorney, and who is known to me, acknowledged before me on this day, that, being informed of the contents of said power of attorney, he executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this 9th day of February, A. D. 1871.

[SEAL.] (Signed) W'M. V. ARCHER,
Commissioner for Alabama in New York,
117 *Broadway, N. Y. City.*

(Endorsed:) Charles Morgan to Thomas Forbes. Dated February 3rd, 1871. Power of attorney.

Circuit court of the United States for the fifth judicial circuit and southern district of Alabama.

CHARLES MORGAN
vs.
JOHN PARHAM.

Bond.

Know all men by these presents that we, Charles Morgan and Hugh Monroe, are held and firmly bound unto John Parham in the sum of one thousand dollars, to be paid to the said John Parham, his executors, or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the fourteenth day of February, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas the above-named Charles Morgan hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the circuit court of the United States for the fifth judicial circuit and southern district of Alabama:

Now, therefore, the condition of this obligation is such, that if the above-named Charles Morgan shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then

this obligation shall be void ; otherwise the same shall be and remain in full force and virtue.

(Signed) CHARLES MORGAN,
By THO'S FORBES,
Att'y-in-fact.
H. MUNROE.

Sealed and delivered in the presence of—
N. W. TRIMBLE.

Taken and approved this 18th day of February, A. D. 1871.
N. W. TRIMBLE, *Clerk, &c.*

11 Filed February 18th, 1871.
N. W. TRIMBLE, *Clerk.*

UNITED STATES OF AMERICA :

Circuit court of the United States for the southern district of Alabama.

The President of the United States to the marshal of said district, greeting :

You are hereby commanded to summon John Parham, who is a citizen of the State of Alabama, to appear before the circuit court aforesaid, at the place of holding said court, at Mobile, on the 2d Monday of April next, then and there to answer the complaint of Charles Morgan, who is a citizen of the State of New York, and have you then and there this writ.

{ SEAL OF U. S. CIRCUIT COURT. } Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 4th Monday of December, in the year of our Lord one thousand eight hundred and sixty-seven.

Issued the 24th day of March in the year of our Lord one
12 thousand eight hundred and sixty-eight.

Attest: N. W. TRIMBLE,
Clerk C. C. Southern District of Alabama.

UNITED STATES OF AMERICA :

Circuit court of the United States for the southern district of Alabama.
April term, 1868.

CHARLES MORGAN, PLAINTIFF,
vs.
JOHN PARHAM, DEFENDANT.

The plaintiff, who is a citizen of the State of New York, complains of the defendant, who is a citizen of the State of Alabama, and within the jurisdiction of this court, of a plea of trespass, for that the said defendant, on the seventh day of May, in the year of our Lord 1867, with force and arms, &c., to wit, at Mobile, Alabama, seized and took a certain steamer or vessel of the said plaintiff, called the Frances, of great value, to wit, of the value of seventy-five thousand dollars, and in which said steamer or vessel the said plaintiff then and
13 there intended and was about to carry and convey certain

goods, chattels, merchandise, and passengers for a certain freight and reward to be therefor paid to the said plaintiff, and then and there kept and detained the said steamer or vessel from the said plaintiff for a long space of time, to wit, hitherto, and thereby the *the* said plaintiff was hindered and prevented from carrying and conveying the said goods, chattels, merchandise, and passengers as aforesaid, and thereby lost and was deprived of the profits, benefit, and advantage which might, and otherwise would, have arisen and accrued to him therefrom, to wit, at Mobile, Alabama aforesaid. And other wrongs to the said plaintiff then and there did, to the damage of the said plaintiff of five thousand dollars. And therefore he brings his suit.

And the plaintiff, who is a citizen of the State of New York, claims of the defendant, who is a citizen of the State of Alabama, and within the jurisdiction of the court, the further sum of five thousand dollars as damages for wrongfully taking the following goods and chattels,
14 the property of the plaintiff, viz, the steamer or vessel called the Frances.

SMITHS & HERNDON,
Pl'ff's Att'ys.

I acknowledge myself security for costs at the instance of the plaintiff in the above suit.
(Signed) THO'S FORBES.

Marshal's return.

Rec'd M. O. March 24th, 1868; executed on the 25th day of March, 1868, on John Parham, the defendant in the within case.

R. W. HEALY,
U. S. Marshal,
By W'M D. GAGER,
Deputy.

Circuit court of the United States, southern district of Alabama. April term, 1868.

CHARLES MORGAN
vs.
JOHN PARHAM.

The defendant, for answer to the complaint, saith he is not guilty of the matters alleged therein.

15 And for further and special plea in this behalf, with leave of the court first had and obtained, the defendant saith actio non, because he says that at the time of the alleged grievance he was the tax-collector of the city of Mobile, legally elected and qualified as such; that the said steamer or vessel called the Frances, along with other steamers or vessels of the plaintiffs, were duly and legally assessed by the tax-assessor of the said city of Mobile as personal property, within the corporate limits of the said city of Mobile, belonging to the plaintiff; that said assessment was made in all respects in pursuance of the law of the State of Alabama; that, under and by authority of law, the defendant, as tax-collector as aforesaid, seized and took into his possession the said steamer or vessel for the purpose of enforcing the payment of said taxes due thereon to the city of Mobile; that the said plaintiff, at the time of said seizure, had no other personal or other

property within the corporate limits of the said city, within the knowledge of the defendant; that there was due and owing from the
16 plaintiff to the corporate authorities of said city the sum of seven thousand dollars, as tax assessed as aforesaid.

Wherefore defendant avers that he was justified in the seizure of said steamer or vessel as aforesaid.

C. F. MOULTON,
Attorney for Defendant.

Filed 7th day of April, 1868.

N. W. TRIMBLE, *Clerk.*

Circuit court of the United States for the southern district of Alabama.

CHARLES MORGAN, PLAINTIFF,
vs.
JOHN PARHAM, DEFENDANT.

A statement of facts & other matters agreed upon by the parties to this suit.

It is agreed that the steamer Francis which is mentioned in the complaint was brought to the city of Mobile, Alabama, in the year 1865; that from that time until now she has been regularly and exclusively employed in the trade between the city of Mobile & the city of New Orleans, Louisiana, as a coasting steamer; that, on the 4th
17 January, 1867, she was regularly enrolled, pursuant to the acts of Congress, at the custom-house of the United States in the city of Mobile, for the coasting trade, by George Blakesley, as master, and her license for the coasting trade was renewed at said custom-house on the 3rd day of January, 1868, and again on the 2nd day of January, 1869, by the same master; that, from 1865, until now, other steamers belonging to the plaintiff have also been exclusively employed in said trade, and they, with the said steamer Francis, have constituted a daily line of steamers between the said cities of Mobile and New Orleans; that of said other steamers the Mary was enrolled at the said custom-house, on the 7th January, 1867, for the coasting trade, by Thomas Carroll as master; and the Louise was enrolled at said custom-house, for the coasting trade, on the 15th Nov., 1867, by I. Hopkins as master; that said steamers, Mary and Louisa and the steamer Francis, were all so enrolled as property of the plaintiff; that the license of the Mary was renewed at said custom-house by said Carroll, as master, on the 3rd January, 1868, and again on the 2nd January, 1869; that,
18 during the time said steamers have been in the trade between the cities of Mobile and New Orleans as aforesaid, they have been exclusively commanded by masters or captains, who, during that time and before then, were resident citizens of the city of Mobile; that, during that time, Capt. Forbes has been the managing agent of the business of said steamers at the Mobile end of their line, and has resided all the time in the city of Mobile, and occupied an office in said city of Mobile exclusively for the business of said steamers, and has employed and paid persons to assist him in Mobile in such business; that C. A. Whitney & Co., who reside in New Orleans, are agents for said steamers, superior to the agency of said Forbes, in Mobile, and said Forbes receives instructions from them; that the plaintiff is the

owner of a large number of other steamers, plying regularly between the city of New Orleans and different ports on the coasts of Texas, and said Whitney & Co. have a controlling power alike over the steamers plying between the cities of Mobile and New Orleans,
19 and those plying between the city of New Orleans and the ports in Texas; that said Whitney & Co. employ and pay the captains and other officers of the Francis, Mary, and Louise, and also employ and pay the said Forbes; that during the time said Francis, Mary, and Louise have been employed in the trade between the cities of Mobile and New Orleans, they have had the exclusive use of a wharf in the city of Mobile, secured and rented for their use by the said managing agent of their business, residing in Mobile, and during that time said managing agent at Mobile has rented and occupied an office in the city of Mobile solely for the transaction and management of the business of these steamers; that said steamers were built at Wilmington, Delaware, and were designed for domestic trade; that they are of light draft, and well adapted to the trade in which they are now employed; that during the time they have been employed in the trade between the cities of Mobile and New Orleans, they have made regular and daily trips, passing along the shallow waters and near the coasts be-
20 tween these cities, transporting passengers, freight, and the United States mails. Their business has been extensive and profitable. For the greater part of the time they have had and controlled the most of the business of carrying freight and passengers between the said cities of Mobile and New Orleans. The Alabama terminus of said line of steamers has all the time been in the city of Mobile, at the wharf secured for their use as aforesaid, and which is in the middle water-front of the city. They have constantly brought to and discharged at said wharf large quantities of freight and merchandise, for the use and benefit of the inhabitants of the city of Mobile and the people of Alabama. They have, in like manner, constantly received at said wharf, and carried away from it to the city of New Orleans, large quantities of freight—cotton and merchandise, supplied to them by the citizens and tradesmen of the city of Mobile and the people of Alabama. One or another of said steamers has daily arrived at and departed from said wharf, the steamer arriving always remaining at the wharf long enough to discharge all of her passengers and
21 freight, and to take on board and receive a new cargo and a new set of passengers, and usually remaining, in the winter season, from 24 to 30 hours. The repairs of said steamers have sometimes been made in the city of Mobile, and sometimes in the city of New Orleans. When it has been necessary to dock one of them she has been sent for that purpose to New Orleans. Their supplies have been sometimes procured in Mobile, and sometimes in New Orleans. Their fuel has been principally supplied at Mobile.

It is further agreed that the charter of the city of Mobile, granted by the legislature of Alabama, authorizes and empowers the corporate authorities of the city to levy taxes on the real and personal property within the city; that, in the year 1866, the said steamer Frances was assessed by the corporate authorities of the city of Mobile as personal property within the city at the value of $100,000, and in the year 1867, at the value of $75,000, and that at the time of the seizure of the Francis by the defendant, the taxes due upon her to the city of Mobile,
22 if she was subject to taxation by the city of Mobile, were $1,000 for the year 1866, and $937 50 for the year 1867; that said

steamer' Mary and Louisa were also assessed by the corporate authorities of the city of Mobile as personal property within the city, in the years 1866 and 1867, and if they were subject to taxation by the city of Mobile, the taxes due upon them to the city at the time of the said seizure of the Francis, were $2,787 50; that all of said steamers were assessed as aforesaid as personal property within the city of Mobile, and as property belonging to the plaintiff; that said assessments were regularly made pursuant to the provisions of the charter of Mobile, and the ordinances and by-laws of the city, adopted by authority thereof; that the defendant was the duly elected and qualified tax-collector for the city of Mobile at the time of the seizure of the Francis by him complained of in the complaint, and as such he was authorized and required by the charter and ordinances to levy upon real and personal property within the city to enforce the payment of taxes duly
23 assessed and due thereupon, and that if said steamers were subject to taxation by the city of Mobile, the defendant at the time of the seizure of the Francis, was authorized and required by law to seize, and if necessary to sell her, as well to enforce the payment of taxes due upon her as to enforce the payment of the taxes due upon the Mary and the Louise, it being admitted that they were and are all of them the property of the plaintiff.

It is further agreed that, before the said steamer' Francis, Mary, and Louise were brought to the city of Mobile as hereinbefore stated, they were severally and duly registered, pursuant to the acts of Congress, in the custom house of the United States at the city of New York, in New York State, under the ownership of the plaintiff, and the names of said steamers, and the name of the port of New York, were at the time of said registration, have been since, and are, painted on their respective sterns according to the acts of Congress; that at the time of such registry the plaintiff was, and from that time until now
24 has continued to be, a resident citizen of the said city of New York; that, at the time of said registry, said steamers were, and from that time until now have continued to be, the property of the plaintiff.

The parties to this suit have agreed to waive a jury, and submit to the court the facts hereinabove stated and admitted, for judgment upon them. It is further agreed that if the court should be of opinion that on said facts the plaintiff is entitled to recover, then judgment shall be rendered in favor of the plaintiff for two thousand dollars; but if the court should be of opinion that the plaintiff is not entitled to recover upon said facts, then judgment shall be rendered for the defendant. The right to appeal to the Supreme Court of the United States from the decision and judgment of this court, is expressly reserved to either party.

And it is agreed, if judgment should be rendered against the defendant, he may appeal therefrom on giving bond and security for the costs only, and no execution shall issue upon the judgment until after the decision of the Supreme Court.

25

C. W. RAPIER,
Att'y for Defendant.
GRANDIN & TOULMIN,
Att'ys for Plaintiff.
C. F. MOULTON,
Att'y for Defendant.

CHARLES MORGAN
vs.
JOHN PARHAM.

In this case it is stipulated and agreed that the same may be tried by the court without a jury, a jury being hereby expressly waived.

GRANDIN & TOULMIN, *for Pl'ff.*
C. W. RAPIER, *for Def't.*

April term, 1870.

Circuit court of the United States for the fifth judicial circuit and southern district of Alabama. December term, 1870.

MONDAY MORNING, *January 2nd, A. D.* 1871.

26 Court met pursuant to adjournment—present, Hon. William B. Woods, judge presiding.

Decree.

CHARLES MORGAN
vs.
JOHN PARHAM.

In this cause, which, at a former term of this court, was submitted to the court upon a written statement of facts and written arguments of counsel, the court is opinion, after consideration of the facts and arguments, that judgment should go in favor of the defendant. It is therefore ordered and adjudged that the defendant go hence without day, and that he have and recover of said plaintiff, Charles Morgan, the costs of this cause.

UNITED STATES OF AMERICA:

Circuit court of the United States for the 5th judicial circuit and southern district of Alabama. December term, 1870.

CHARLES MORGAN
vs.
JOHN PARHAM.

27 Be it remembered that, on the second day of January, 1871, being a day of said term, this cause came on to be heard, and was submitted to the decision of the court on the agreed statement of facts herewith filed and made a part of this bill of exceptions. No further testimony was submitted by either party; whereupon the court gave judgment for the defendant, to which the plaintiff then and there excepted, and he now tenders his bill of exceptions, and prays that the same may be signed and sealed and become a part of the record.

January 10, 1871.

(Signed) W. B. WOODS, [SEAL.]
Judge presiding.

Circuit court of the United States for the fifth judicial circuit and southern district of Alabama.

I, Nathaniel W. Trimble, clerk of the court aforesaid, do hereby

28 certify the foregoing pages contain a true and correct transcript of the record, proceedings, and evidence in the case of Charles Morgan versus John Parham, as the same remains on file in my office.

In testimony whereof I have hereunto subscribed my name and caused the seal of said circuit court to be affixed this the 10th day of March, A. D. 1871.

[SEAL.]

N. W. TRIMBLE,
Clerk U. S. District Court 5th Judicial Circuit and Southern District of Alabama.

(Indorsement on cover:) No. 547. Charles Morgan, plaintiff in error, vs. John Parham. S. Alabama C. C. U. S. Filed 14th June, 1871.

Supreme Court of United States.

CHARLES MORGAN
vs.
JOHN PARHAM.
} No. 100.

Charles Morgan, a citizen of New York, brought his action of trespass against the defendant in error, in the Circuit Court of the United States for the Southern District of Alabama for the seizure and detention of a certain steamer named "Francis" owned by him.

The defendant justified, as being in the discharge of his duties as tax collector of the city of Mobile, and that there was due at the date of the seizure, for taxes assessed on said "Francis" and other steamers owned by the plaintiff, the sum of $7,000.

A jury was waived and the cause submitted to the judge on an agreed statement of facts to be found at p. 6.

Judgment was rendered for defendant, which a writ of error was sued out, and the plaintiff in error now comes and avers.

Assignment of Error.

That there is error in the judgment; and on the agreed statement judgment should have been rendered for plaintiff in the suit below.

The material facts are these: Mr. Morgan, a citizen and resident of New York, owned in 1865 among other steamers engaged in commerce between the States, the steamers Francis, Mary, and Louise which he employed in carrying passengers, freight, and mails, between the two States of Louisiana and Alabama, to wit: between the ports of New Orleans and Mobile. For the promotion of this commerce, Mr. Morgan had an agent in Mobile, and also agents who resided in New Orleans, the principal agency being in the latter city controlled by Whitney & Co., who not only supervised the line to Mobile, but also another line of steamers owned by Mr. Morgan which plied between New Orleans "and different ports on the coast of Texas."

In the exercise of this supervision and control, it was the duty of Whitney & Co., not only to disburse all expenses incurred by these lines in the payment of officers and others, but to employ and pay the agent at Mobile, (Forbes.)

These steamers were built at Wilmington, Delaware, and were registered "pursuant to the acts of Congress in the Custom House of the United States, at the city of New York under the ownership of the plaintiff and the names of said steamers, and the name of the port of New York were at the time of registration, have been since, and are painted on their respective sterns according to the act of Congress.

In carrying on this commerce, "one or another of said steamers has daily arrived at the wharf, (secured for their use,) the steamer arriving always remaining at the wharf long enough to discharge her passengers and freight and receive a new cargo," the time being from 24 to 30 hours.

On the other hand it was admitted that the captains of the steamers were resident citizens of Mobile, and that they had enrolled them in the Custom House at Mobile. That Forbes the agent of Mobile had an office in that city, and had rented a wharf exclusively for their use. That repairs were sometimes done in Mobile, at other times in New Orleans. When it was necessary to dock, the steamer was sent to New Orleans. Supplies were drawn from both cities, and fuel principally from Mobile.

It was further agreed—"that the charter granted by the Legislature of Alabama to the city of Mobile, authorizes and empowers the corporate authorities of the city, *to levy taxes on the real and personal property within the city.*

HOME PORT.

The 4 section of the act of 1789, is re-enacted in the 3 section of the act of 1792, (1 Stat., 56, 288,) which provides that "every ship or vessel shall be registered by the collector of the District in which such ship or vessel shall belong at the time of her registry, and her port shall be that nearest to which, her owner, husband or acting and managing owner usually resides, and the name of the vessel and the port to which she shall so belong shall be painted on her stern, &c., and the omission to designate the name "and *port to which she belongs* is made subject to a penalty.

The act of 1793, (1 Stat., 305) for enrolling and licensing vessels employed in the coasting trade, subject them to "the same requisites in all respects as are made necessary for registering ships or vessels" under the former acts.

Commenting on this act, Mr. Justice Clifford held in Blanchard v. Brig Martha Washington, (1 Cliff., 463,)

that the home port is defined by the law to be, that, at or nearest to which the owner if there be but one, usually resides.

In Hill v. Golden Gate, (Newberry 308,) it is said, " whether a vessel is domestic or foreign depends on the residence of her owners, not upon the port of her enrollment. The Supreme Court of the United States look to the residence of the owners, not to the place of enrollment to determine her character."

The same language is held by this Court in the case of Hays v. Pacific Mail Steamship Company, (17 How., 596.)

"These provisions and others that may be referred to very clearly indicate that the domcile of a vessel that requires to be registered, or home port, is the port at which she is registered and must be the nearest to the place where the owner resides."

It is thus established that the home port of these vessels was in New York where their owner resided. Though the vehicles of commerce it is not maintained they were therefore exempt from State taxation. This power was exerted by the State of New York which had the right to tax all the personal property owned by its citizens.

The question is whether these vessels could also be taxed by Alabama? If they could be they were equally subject to the taxing power of Louisiana, Mississippi, or of any other State ~~act~~ at whose port they might touch in carrying on commerce between the several States.

The constitutional provisions intended to secure harmony and equality are very emphatic. Not only is the power to regulate commerce between the States trans-

ferred in express terms to the Federal Government, but as if to make assurance doubly sure, express prohibitions are laid upon the States which exclude them from levying any impost or duty on exports or imports, or "any duty of tonnage," again "nor shall vessels bound to or from one State, be obliged to enter, clear, or *pay duties in another.*" This last provision is to be found among the limitations on Federal power, but we assume it to be equally obligatory on the States.

The tax levied in this case, is included in all of these provisions. We are to look at the substance of things and not to mere names. If the tax is not within the intent of the constitution, it will not be held to be unconstitutional because it is called a tonnage duty, (Cooley v. Board of Warden's 12 How., 314,) as where pilot fees were laid at so much per ton. On the other hand a tax upon a vessel though not called a tonnage tax, when it falls within the intent will be held unconstitutional. Thus by an act of Louisiana, the port warden's were allowed to collect $5 from every vessel arriving at the port of New Orleans. This Court held that such an act "came within none of the limitations or exceptions to the general rule of the constitution, that the regulation of commerce among the State is in Congress."

They further held—"that this tax is in the fair sense of the word, a duty on tonnage. In the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage: a certain rate on each ton. But it seems plain that taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition against levying duties on imports or exports, would have been ineffectual, if it had not been extended to duties on ships which serve as vehicles of conveyance. This extension was

doubtless intended by the prohibition of any duty on tonnage. It was not only a *pro rata* tax which was prohibited, *but any duty on the ship*, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty.

(Steamship Co. v. Port Warden, 6 Wall, 34.)

The commercial clause is of very entensive signification, it includes the power to regulate navigation, and to prescribe rules in conformity with which it is to be carried on. It extends to the persons who conduct it, as well as to the instruments used.

(Cooley v. Port Warden, 12 How., 316.)

Construction of the state act.

The act under which the city claims the right to tax is as follows "the Mayor, Alder men and Common Council shall have power to lay taxes on both the personal and real estate *within said City.*"

As a mere geographical question a vessel lying at the wharf is not within the city. It is at the city but not in it. As a legal question it is still more clear that vessels thus situated were not within the intention of the Legislature.

Admitting that the act intended to embrace personal property of a non-resident equally with that of a citizen. it yet could only include such property as had a *habitat* or *situs* within the territorial limits. It could not have been intended to include the property of an emigrant passing through the city, though he may have rested from his journey a day or two. In like manner these travelling steamers are not to be brought within its intent because in passing to and fro they stop a few hours at the wharf of the city.

Their wharf, their office are both taxable, they are in every just sense property within the city—but the steamers themselves cannot be justly included.

In the case of Hays v. Pacific Mail Steamship Co. already cited the steamers were owned and registered in New York and were engaged in trading between that port and San Francisco. The act of California taxing them being before the Court they said, that the length of time that a vessel engaged in this Commerce should be within the port of the states, furnishes no evidence that she has become a part of the personal property within the state, and that however long absent "they neither loose their national character, nor their home port, as inscribed upon their stern." Further "the state of California had no jurisdiction for the purpose of taxation for the vessels *were not properly abiding within its limits* so as to become incorporated with the other personal property of the state. They were there but temporarily engaged in trade with their *situs* at the home port, where the vessels belonged and where the owners were liable to be taxed for the capital invested."

In the late case St. Louis v. Ferry Company, which in all material respects is like the case in hand, the Court while holding the maxim *Mobilia sequntur personam*, qualify it by saying, that this doctrine does not stand in the way of the taxing power in the locality where the *property has its actual situs*," But applying the rule to the case before it they decide:—

1st. That the solution of the question as to where was the home port, depends wholly upon the locality of the owners residence, and not upon the place of enrollment.

2d. The relation of the boats to the city was merely that of contact as one of the termini in the promotion of their business.

3d. They therefore did not so abide *within the city* as to become incorporated with and form a part of its personal property. Hence they were beyond the jurisdiction of the state.

(11 Wall, 431.)

The authorities on this last proposition are collected by Mr. Dillon in his work on municipal corporation, § 625,-6,-7.

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DECEMBER TERM, 1872.

CHARLES MORGAN
vs.
JOHN PARHAM. } No. 100.

Brief of C. W. RAPIER,

FOR THE DEFENDANT.

H. Polkinhorn & Co., prs., Washington, D. C.

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FOR THE DEFENDANT.

The steamers in question, under the circumstances, shown by the statement agreed upon and found in the record, were subject to the tax imposed by the City of Mobile, and consequently the seizure made by the City tax collector was rightful.

The steamers were subject to the tax—1st, because by actual presence and just fictions of law, they were for the purposes of taxation, within the City, and being within the City, the City was authorized by the legislation of the State to impose the tax; 2d, because the State possessed in full, as an incident of her sovereignty, the right to tax such property within her limits, or to authorize it to be taxed, except so far as such right was restricted by the Federal Constitution or by constitutional acts of Congress; and there was no such restriction.

That the States have, as an incident of sovereignty, the power to tax all property within their jurisdiction, except when such taxation would be repugnant to, or in conflict with some provision of the Federal Constitution or some constitutional act of Congress, is a principle recognized and asserted in the cases of McCulloch, 4 Wheat., 316; Brown, 12 Wheat., 419; Providence Bank, 4 Peters, 514; Lane County, 7 Wallace, 77; Battle and Stewart, *vs.* the City of Mobile, 9 Ala., 234; and in many other cases that might be cited.

In the statement agreed upon in this case, it is admitted, that the law of Alabama authorized the corporate authorities of Mobile to lay taxes on real and personal estate within the City. Now, were the boats in question for the purposes of taxation within the City? This question is affirmatively answered by the decision of the Supreme Court of Alabama, in the cases above cited of Battle and Stewart, 9 Ala., 234. The two cases were considered together. The boats in question were employed in trade between Mobile and Montgomery. The owners of one of them resided in Mobile; the owner of the other was a resident-citizen of Pennsylvania. It was held, that both boats were alike liable to the tax imposed by the City. The Court say—"The general question as to the delegation of the taxing power to civil corporations is not disputed, and indeed, has several times been decided by us in other cases, (Intendant of Marion v. Chandler, 6 Ala. Rep., 899; Esterbrooks v. State, Ib., 653.") They say further—"The power of taxation is a necessary accompaniment of the power of legislation, and is limited only by the extent of that power. It necessarily, therefore, operates upon all persons and property belonging to the body poli-

tic. Its relinquishment ought not to be presumed, but rather should be demonstrated by those who claim exemption. Now, although it be conceded, that the State has relinquished the right to levy a specific tax on vessels navigating her rivers, and is debarred by the Constitution of the United States from interferring with the regulations of commerce, whether foreign or between the several States, yet it, by no means follows, that she has relinquished, or, is any way prevented from exercising the power of taxing the property employed within her limits in these avocations." Again, they say, "It is believed to be the common practice, over the entire Union, to tax the personal estate of citizens, although that may be employed in foreign or domestic commerce." And again, in speaking of the taxability of a boat in one State when the owner resides in another, they say, "we entertain no doubt, whatever, that the personal estate of a citizen of another State, when employed in this State, is as much the subject of taxation as property of the same kind belonging to our own citizens; the fact that it is also held elsewhere subject to taxation, is not a circumstance which interferes with the exercise of the power in the State where it is.

The decision in Alabama, though not conclusive in this Court, as to the validity of the State law, is yet entitled to high respect from being made by the highest tribunal of a soverign State. But as regards the scope and meaning of the law—it is conclusive if the law be constitutional. Nessmith v. Sheldon, 4 McLean's Rep., 375; Green v. Neal, 6 Peters, 291.

Yet it is contended on the part of the plaintiff, that the boats in question must, for the purposes of taxation,

be regarded as being in the State of New York, where their owner resides; and, consequently, that they cannot be considered as being within the State of Alabama. Between Alabama and New York there is no room for controversity upon this subject. They are alike sovereign States, having each the right, except so far as restrained by the Federal Constitution and laws, to tax, to any extent, the people and property within their respective jurisdictions. It is only by reference, therefore, to the intervening powers of the General Government, that it can be determined whether, under the circumstances of this case, the steamers are subject to taxation in the one State or the other, or in both.

I assume, that steamboats and other vessels belonging to citizens of the United States are subject to the taxing power of some one or other State. This seems to be conceded in the case of Hays, 17 How., 596. But in what State may this class of property be taxed? and how far is any State restricted from taxing it?

In sections 9 and 10, of Article 1, of the Constitution, it is provided, that no preference shall be given to the ports of one State over those of another; nor shall vessels bound to and from one State be obliged to enter, clear, or pay duties in another. No State, without the consent of Congress, shall lay any imposts or duties on imports and exports, &c.; no State shall, without the consent of Congress, lay any duty on tonnage. There are no other restrictions in the Constitution upon the power of the States to tax this species of property. With these exceptions, the right is reserved to the States to tax such property as they may tax any other kind of personal property, unless there be restriction by acts of Congress regulating commerce.

Now in all the acts of Congress regulating commerce, there is no express provision in reference to the taxing

power of the States in regard to this kind of property, or which assumes to limit its taxability to a particular State or locality. Such limitation, if there be any, can only be implied.

In the registry act of 1792, it is among other things provided, that a ship or vessel is to be registered by the collector of the district comprehending the port to which the ship or vessel shall belong at the time of her registry, which port shall be deemed to be that at or nearest to which the owner of such ship or vessel usually resides. This portion of the act was evidently intended only to prescribe, as a part of a system of maritime regulations, the place of registration, and had no reference whatever to the taxing power of the States. In this act and in the many subsequent registry and enrollment acts, there is no indication anywhere of an intention on the part of Congress to interfere with the taxing power of the States. These acts were designed for other purposes.

With the exception of the restrictions above mentioned, there is no clause in the constitution relating to the taxing power of the States; nor is there anything to be found in the legislation of Congress, which makes a distinction for taxing purposes, between this class of property and any other kind of personal property.

The general rule respecting the taxation of personal property by individual States, is that such property does not follow the person of the owner; that if it is not merely in transitu, but abides as it were in a State, or is blended with her commerce or the property of her citizens, it becomes subject to the taxing power of such State. 23 New York, R., (9 Smith,) 224; 32 Penn, 381;

21 Verm., 152; 3 Ind. R., 481; 19 Ill. R., 160; 14 B. Munroe, 648.

It is contended on the part of the defendant that the steamers in question, under the circumstances of this case, are not taxable in New York. That this is so is shown by the able opinion of the Court in the case of Hoyt, 23 New York R., (9 Smith,) 224. But if they were taxable in New York, would it necessarily follow that they are not also taxable in Alabama? To hold that they are taxable in New York, and for that reason that they are not taxable in Alabama, would be to apply in its full force a fiction of law that would operate unjustly. By a fiction they would be considered as following the person of the owner, and as being in the State of New York; whereas, in fact, they abide in Alabama, and have not for three or more years been within the limits of New York. It would be plainly unjust to Alabama to permit this fiction to withdraw them from her taxing power. Taxes are due to a State or government in consideration of the protection given by the laws of the State. The vessels in question, and their business have been constantly protected, year in and year out for several years, by the laws of Alabama. They have shared largely in the commerce of Aalabama. They have brought large profits to their owner. And yet a fiction of law is invoked to deprive this State of the right to tax them.

Fictions of law are inadmissible when they would operate unjustly. 3 Vol., Blackstone, 35, (Marginal p. 43;)

Story's conflict of laws, p. 924, sec. 550; the case of Hoyt, 23 New York, (9 Smith,) 228; 21 Verm. R., 159.

The case of Hays, 17th How., 596, is much relied on by the plaintiff's counsel. That case was widely different from the case under consideration. From the facts of that case, as shown by the pleadings, and by the application of fictions of law which did not operate unjustly, the steamer then in question was regarded as being all the while in New York, and as merely touching in transitu at the port of San Francisco. She was owned and registered, and her business was managed in New York. She was at no time severed from a direct participation in the commerce of New York. Other vessels belonging to her proprietors, would carry goods in the regular course of trade from New York to Panama where she would receive them, and transport them to different ports on the coasts of California and Oregon, and then return to Panama with frieght and passengers which would thence be carried by vessels belonging to the same proprietors to New York, and all the while taxes were assessed upon her and paid in New York. Under these circumstances, it was held that she could not be regarded as abiding in San Francisco, but merely as a transient visitor at that port. And by the application of convenient and reasonable fictions of law, it was held that she must be considered as abiding in New York.

The decision in that case amounts to nothing more than this, that a steamboat owned and registered in New York, which is required to pay taxes in that State, and which is without cessation directly connected with the commerce of New York, is not liable to taxation in another State at whose ports she occasionally touches in passing.

In the present case, the steamers for several years have had no connection with the commerce of New York; they abide in the City of Mobile as far as it is in the nature of such property to abide at any place; they are not managed in New York, but their management is at Mobile in part, and in part at New Orleans; they are enrolled at Mobile, and their masters reside at Mobile; they have a wharf and a business office in Mobile; they directly, constantly and largely participate in the trade and commerce of Mobile; they pay no tax in New York, at least, it is not admitted that they do, and it is contended that they are not required by the laws of New York to do so, (see 23 New York R., supra,) and by no just and reasonable fictions of law, can they be regarded as merely touching in transitu at the port of Mobile. Under these circumstances, if they are not to be considered, for the purpose of taxation, as abiding in Mobile, then it is difficult to perceive that outside of the State in which their owner resides, they can have an abiding place anywhere, and then there would be but little meaning or utility in the opinion of Mr. Justice Campbell, in the case of Hays, where he say, "The material fact is that the vessels were in transitu having no *situs* in California nor permanent connections with its internal commerce."

It is admitted on the part of the defendant that a State has not the right to tax goods passing overland through it, from one State to another for the purpose of traffic. This would interfere with the regulations of commerce, 12 Wheat., 419. But when a boat passes from one State to another, she may, or may not be in transitu as to the State from which or that to which she goes—she will not be merely in transitu in that State in

which she abides, and with whose commerce she has something of a permanent connection.

The Court is called on, in the present case, to declare that Alabama had not the right to impose or to authorize the tax in question—that as affecting such property as that under consideration, the act of her legislature must be held to be repugnant to the Constitution and laws of the General Government and void. It should not be so declared unless it is clear that the right did not exist.

In the case of Fletcher v. Peck, 6 Cranch, 88, the Chief Justice said: "The question whether a law be void for its repugnance to the Constitution is at all times a question of great delicacy; which ought seldom, if ever, to be decided in the affirmative in a doubtful case." "The opposition between the Constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other." In the Dartmouth College case, 4 Wheat., 125, the Court say, "on more than one occasion the Court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that in no doubtful case would it pronounce a legislative act to be contrary to the Constitution." In Calder v. Bull, 3 Dall., 386, it is said by Mr. Justice Chase, "if ever I exercise the jurisdiction, I will never decide any law to be void, but in a very clear case." And Mr. Justice Iredell said, in the same case, "that the Court will never resort to that authority, but in a clear and urgent case." In Cooper v. Telfair, 4 Dall., 14, Mr. Justice Patterson said, to authorize this Court to pronounce any law to be void, it must be a clear une-

quivocal breach of the Constitution—not a doubtful and argumentative implication." In the case of the Providence Bank, 4 Peters, 561, Chief Justice Marshall, speaking of the taxing power of a State, says: "that it is of vital importance; that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. * * * It would seem that the relinquishment of such a power is never to be assumed.

If it should be considered, that a vessel engaged in the coasting trade, ought not ,under any circumstances, to be taxed by more than one State, then in this case, from the fact of the enrollment being made at Mobile, the right, as between New Orleans and Mobile, should be determined in favor of the latter. It may well be intended, from the place of enrollment and other circumstances, that the plaintiff had elected that Mobile should be the home port of his steamers.

C. W. RAPIER,
For Defendant in Error.

Supreme Court of the United States.

CHARLES MORGAN

vs.

JOHN PARHAM.

Argument of C. F. MOULTON for the Defendant and the City of Mobile.

Supreme Court of the United States

CHARLES MORGAN

Vs.

JOHN PARHAM.

Argument of C. F. MOULTON for the Defendant and the City of Mobile.

STATEMENT IN BRIEF OF THE PLAINTIFF'S CAUSE OF ACTION AND FACTS AGREED UPON.

Action brought in the Circuit Court of the United States, at Mobile, in the State of Alabama, by Charles Morgan, of the State of New York, against John Parham, Tax Collector of the city of Mobile, to recover damages for levying a tax execution upon a steamboat belonging to the plaintiff.

The cause was submitted to the court for judgment, without the intervention of a jury; whereupon the circuit court rendered judgment in favor of the defendant.

AGREED STATEMENT OF FACTS.

In the year 1867, the defendant was the tax collector of the city of Mobile. In that capacity he levied a tax execution upon a steamboat belonging to the plaintiff, to enforce the collection of taxes previously assessed against the plaintiff, as the owner of the steamboats called the "Mary," "Frances," and "Louise"; that this assessment was made in

conformity with the laws of the State and city governments authorizing the levy of taxes on the real and personal property within the corporate limits of the city of Mobile; that these boats were *enrolled* and *licensed*, in compliance with the act of Congress, in the Custom House at Mobile; that since 1865, one or more of these boats have constantly been at the wharf in said city; that the plaintiff rented wharf property in the city for his accommodation and business facilities; that the masters and officers of these boats resided in said city; that these vessels were constantly engaged in making daily trips between the cities of Mobile and New Orleans and occasionally touching at a port in the State of Mississippi, and running in the shallow waters near the coast; that these boats were engaged in extensive and profitable commerce with the people of Alabama; that the plaintiff at the time of the commencement of this suit (and at this time) was a resident of the State of New York; that the boats before they were brought to Mobile were registered in the Custom House at New York; that they were built for the coasting trade and not for foreign service; that prior to their being brought to Mobile and placed in this trade, they were registered at New York, and the name of that port painted on the sterns of them; that the plaintiff was then and now the owner of a number of other boats, engaged in the coastwise trade between New Orleans and different ports on the coast of Texas, enrolled and licensed at New Orleans and engaged in extensive commerce.

ARGUMENT.

May it please your Honors :

The assessment of this tax, under the admitted facts of this case, so far as I am informed, presents a question, for the first time submitted to this tribunal for judicial consideration.

The rights involved are of grave importance, affecting the reserved powers of the States, and embracing within its scope the interest of each, having municipal corporations situated on the navigable waters of this county.

This tax was assessed, not against these boats, but *against the proprietor—the plaintiff and owner of the property.*

When assessed, the property was within the jurisdiction of the State of Alabama and the corporate limits of the city of Mobile. There all of these boats were *enrolled* and *licensed.* The masters and officers resided there. Wharf property was rented by the plaintiff, for the use of these boats, where one or more of them were constantly from 1865 to the time of the trial of this cause.

And according to the admitted facts, these boats have for years *extensively* and *profitably* engaged in commercial intercourse with the people of Alabama; and were, of necessity, the constant recipients of the protection afforded by its laws.

And yet it is contended that the *situs* of these boats is within the territorial jurisdiction of the State of New York, and there for the purposes of taxation.

This is so, as it is said, because the plaintiff and owner resides there, and because these boats were originally registered there.

These vessels were constructed for domestic service and have only been employed in such. If this be so, how can the *registry* of these boats in New York avail the plaintiff?

There is no law of Congress requiring the *registry* of such vessels. The act of 1792 only embraces such vessels as are engaged in *foreign commerce*—and by the act of 1793, such vessels as are engaged in *domestic* or coastwise service are required to be enrolled and licensed.

There is no act of Congress, as there could not well be, establishing the domicil of the owner of a vessel. An owner of a vessel, whether registered for foreign or enrolled for home service, is at liberty to select the locality of his home irrespective of the considerations whether he is or not the owner of property of this character.

The only restriction or requirement being, that to be an owner the person must be an American citizen.

A resident of the interior of Ohio, being an American citizen, could lawfully own a vessel registered at New York or Boston, and engage her in foreign commerce, or at his pleas-

ure, in the coastwise service. Could not Mr. Morgan, the plaintiff, change his domicil from New York to Buffalo, St. Louis, Chicago, or Topeka, without effecting his rights to this property, or changing their enrollment?

Suppose the plaintiff's residence had always been in the interior of Wisconsin or Tennessee, and yet the owner of these boats, where then should they have been enrolled—where their *situs*, or home port, either for the purposes of record or taxation?

It may be for the public interest that Congress should legislate upon the subject of the home port of a vessel for the purposes of record. But I submit that it would not be within the defined powers of Congress to fix the *situs* of this species of property for the purposes of taxation.

It is an admitted fact of this case that the plaintiff is not only the owner of these vessels, but a number of others engaged in the coasting trade between New Orleans and Texas.

These vessels are enrolled and licensed at Mobile and New Orleans. They are constantly within the corporate limits of these cities, where their masters and officers reside, where this immense property is protected by the laws of these States, engaged in extensive and constant commerce with the people of these States from year to year, and yet we are told that the State of New York is entitled to the benefits derived from the taxation of this property.

This property is not taxed by the authorities of the State of New York. The record does not affirm that it is so taxed, and it could not be, for the obvious reason that personal property situated beyond the territorial jurisdiction of the State of New York, would not be embraced within the letter or spirit of its laws.

The legislature of that State, in defining what property should be liable to taxation, only embraces real and personal property *situated within the State.* "*All lands and all personal estate within the State*," is the language of the act.

1 R. S., 387, § 1.

If the plaintiff obtains relief from the tax imposed by the authorities of Mobile through the aid of this court, then it is

respectfully submitted that an immunity would be accorded him that would be denied by the courts of the State of New York.

In the case of Hoyt vs. The Commissioners of Taxes, 23 New York, (court of appeals) the statute of that State, defining the property subject to taxation, but more especially personal property situated beyond the boundaries of that State, was brought under review.

After the most mature deliberation it was held that, a *resident of the State of New York was not liable to be taxed on the value of personal property owned by him in the States of New Jersey and Louisiana.*

That authority was cited and approved by this court in Green vs. Van Buskirk, 7 Wallace, page 150.

The legal fiction that personal property followed the residence of the owner, was not recognized either by that or this court, in the case last cited.

The New York court holding that personal property, for taxing purposes, had a legal *situs*, not depending of necessity upon the residence of the owner, but upon the *locus rei sitæ* of the property. That court remarking that "chattels "also have an actual *situs*, although they can be moved from "one place to another. Both are equally protected by the "laws of the State or sovereign in which they are situated, "and both are chargeable there with public burdens, accord-"ing to all just principles of taxation. * * * The logic-"al result is that the tax is incurred, within the jurisdic-"tion, and under the laws of the country where it is situa-"ted. * * * Both, I repeat, are the subjects of taxa-"tion in the foreign jurisdiction."

Again, after quoting from Judge Story (Confl. of Laws, § 550) in support of this proposition, Chief Justice Comstock added: "I can think of no more just and appropri-"ate exercise of the sovereignty of a State or nation over "property situated within it and protected by its laws, "than to compel it to contribute towards the maintenance "of its government and laws."

Wilson vs. The Mayor of New York.
4 E. D. Smith, 678; 28 Barbour, 318.

It is freely admitted that chattels which are in *transitu* through a State or States could not be said to acquire a *situs* for the purposes of taxation. So with a *registered* vessel upon the high seas engaged in foreign commerce, as in Hayes vs. Pacific Mail Steamship Co., 17 How., 596.

A vessel engaged in foreign or domestic service, passing from place to place or port to port, in pursuance of her descriptive voyage, could in no just sense be said to have a *situs* elsewhere than the port where she was *registered* or *enrolled*, returning to her home port as the *terminus* of the voyage. But can these boats be said to be engaged on a voyage with a *terminus* at New York? Not at all. One of them starts on a voyage daily from Mobile to New Orleans, occasionally touching at a port on the coast of Mississippi, and returning to Mobile as the *terminus* of such voyage, where the masters and officers reside, and where the business of these boats is transacted. Then, I submit that for all the purposes of marine commercial traffic, Mobile is the home port of these vessels, and the *situs* for taxable liability.

It is admitted that this species of property is in one sense the creation of, and under the control of Congress.

But the Government of the Union has no pecuniary interest in the vessels and property employed in the merchant service.

Congress may enact laws governing the general management of vessels engaged in foreign or domestic commerce.

But I submit that Congress has not the constitutional power of saying *in what port, or in what State, shall exist the situs of an American vessel for the purpose of taxation.* That question must be left, in all cases, to be determined by the respective facts. The case of Hayes vs. Pacific Mail Steamship Co., *supra*, as I understand it, establishes no such rule; and the law of that case is not at all in conflict with the acts of the city of Mobile in the assessment of this tax.

In that case the vessel was registered in the city of New York, and returned there as the *terminus* of each described voyage. She was engaged in foreign commerce, and in good faith must have been regarded as *in transitu* at every port, whether foreign or domestic, at which she touched during the voyage.

In that case, the office for the transaction of the business of the steamers was in New York, where the property was assessed and the taxes paid; in this case it is at Mobile. In that case the vessel reached the port of San Francisco once in ten or twelve days, and could not well be said to have a permanent connection with the internal commerce of California; whilst in the case at bar the boats are enrolled and licensed at the custom house at Mobile; the officers of the boats reside there; wharves are rented to receive and land goods; one or more of these boats are constantly at the wharf within the corporate limits of Mobile; there the supplies are furnished; there the office for the transaction of business—thus constantly and permanently engaged in extensive and profitable commerce with the people of Alabama, and enjoying the protection afforded by the laws of that State.

Again—the plaintiff was assessed upon the capital represented in these boats. The tax was not a special tax on the boats as such; and in no just sense could it be said to be the "laying a duty on tonnage." It was not a tax or duty upon exports or imports—nor was it a tax upon the means of the general government.

In this important respect the case at bar differs from the facts of the case of St. Louis vs. The Ferry Company, 11 Wallace, 423. In that case the tax was assessed against the boats and not against the proprietor, as in the case under consideration.

In the case now before the court the tax was assessed against the plaintiff upon his personal property represented in these boats, and one of the vessels seized by virtue of the tax execution, to enforce the collection of the tax so assessed, the plaintiff having no other personal property known to the officer.

And the tax having been in this manner assessed, I submit that this court has not the constitutional power, to restrain the sovereign acts of the State of Alabama in this regard. It would be to transcend a boundary beyond which this tribunal has never ventured.

The imposition of this tax violated no compact with the Federal Government—interfered with no cessions of jurisdiction, power or authority yielded by the States to the government of the Union.

And for this reason it is submitted that this court cannot pass upon the legality or review the act of a State, in the exercise of its reserved powers—a political right inherent in the State Government.

In the case of Steubenville and Indiana Railroad Co. vs. Tuscarawas County, 6 Pittsb. Leg. J., p. 64, the court said: "The power of a State to levy and collect taxes is a sover-"eign political power. And if the mode of assessment and "collection adopted does not infringe the Constitution of the "United States, no court of the United States can interfere "with the proceedings of the collecting officers.

In the case of Nathan vs. The State of Louisiana, 8 How., 73, this court said that "the taxing power of a State is one "of its attributes of sovereignty, and when there has been "no compact with the Federal Government, no cession of "jurisdiction for the purposes specified in the Constitution, "this power reaches all the property and business within "the State, which are not properly denominated the means "of the general government; and as laid down by this court, "it may be exercised at the discretion of the State.

"The only restraint is found in the responsibility of the "members of the legislature to their constituents. If the "power of taxation, by a State, within its jurisdiction, may "be restrained beyond the limitations stated, on the ground "that the tax may have some indirect bearing on foreign "commerce, the resources of a State may be thereby essen-"tially impaired."

4 McLean, 25; 9 Ala. R., 234; 4 Wheat., 316;
St. Louis vs. Ferry Company, *supra*.

It is admitted that the States cannot tax the means employed by the general government, for the execution of its powers. But as was said by this court in Thompson vs. Pacific Railroad, 9 Wallace, p. 591, "There is a clear distinction between the means employed by the government and the property of an agent employed by the government."

And again, in the course of the same opinion this court added:

"No one questions that the power to tax all property, business and pursuit, within their respective limits, is original in the States and has never been surrendered."

And in Lane County vs. Oregon, 7 Wallace, 77, this court, after defining the constitutional bounds of State authority in this regard, added:

"In respect, however, to property, business and persons, "within their respective jurisdictions, their power of taxa- "tion remained and remains entire. * * * The extent "to which the taxing power of the State shall be exercised, "the subject upon which it shall be exercised, and the mode "in which it shall be exercised, are all equally within the "discretion of the legislatures to which the States commit "the exercise of the power.

"That discretion is restrained only by the will of the peo- "ple expressed in the State constitutions, or through elec- "tions and by the conditions that it must not be so used as "to burden or *embarrass the operating of the national govern- "ment. There is nothing in the Constitution which contem- "plates or authorizes any direct abridgement of this power by "national legislation.*

"To the extent just indicated it is as complete in the "States, as the like power, within the limits of the Constitu- "tion, is complete in Congress.

"If, therefore, the condition of any State, in the judg- "ment of its legislature, requires the collection of taxes "in kind, that is to say, by the delivery to the proper offi- "cers of a certain proportion of products, or in gold or sil- "ver bullion, or in gold or silver coin, it is not easy to see "upon what principle the national legislature can interfere "with the exercise, to that end, of this power, original in "the States, and never as yet surrendered."

The levy of this tax by the municipal authorities of Mobile, was the same in effect as though it had been levied directly by the State. 2 Black, p. 515.

As before stated, these boats have for years received constant protection from the laws of Alabama; engaged in permanent connection with its internal commerce, in an extensive and profitable manner, and yet, so far as the record discloses, have not contributed one dollar to relieve the burdens of any government.

The object of requiring taxes is to remunerate the State, by supplying it with the means essential to enable it to afford its protection.

In Duer vs. Small, 17 How. Pr., 201, it was appropriately said:

"The owner of property within the limits of a State, no "matter whether the property be real or personal, and no "matter where the owner has his domicil, has a right to "call upon the government of a State to protect such prop- "erty by its laws. But such protection cannot be afforded "unless means, by way of taxes, are furnished to afford the "protection.

"And taxes are no more to be levied upon the property "of the resident to protect the property of the non-resident, "than taxes are to be levied upon the property of the non- "resident to protect the property of the resident.

"If a non-resident does not like to pay for such security "and protection, he can withdraw his personal property "from the State, and thus free himself from such payment.

"But when he asks and demands protection from the "laws, there is no good reason why he should not pay for it; "*and there is no higher law of the United States, which gives a* "*non-resident a right to demand that property of the resident* "*citizen should pay for the protection afforded by the laws to* "*the property of the non-resident.*"

7 Am. Law Register, 500.

Abbott's National Digest, p. 261.

For these and other reasons that might be ~~argued~~ argued, I respectfully submit that the judgment of the circuit court should be affirmed.

C. F. MOULTON,

Of Counsel for Def't and City of Mobile.